Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-266

SYUFY ENTERPRISES, a partnership, successor in interest to original plaintiffs, LAS VEGAS DRIVE-IN THEATRE, INC., SMOKE RANCH DRIVE-IN THEATRE, INC., LAS VEGAS THEATRE CORPORATION, and CONFECTION CORPORATION OF LAS VEGAS, INC.,

Petitioner,

vs.

NATIONAL GENERAL THEATRES, INC., ABC INTERMOUNTAIN THEATRE CO., NEVADA THEATRE CORPORATION, SOUTHWEST AMUSEMENT CORPORATION, LUCILLE MARLEAU CRAGIN, d/b/a EL PORTAL THEATRE, and LAS VEGAS CINERAMA THEATRE CO.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (By Respondent Lucille Marleau Cragin, d/b/a El Portal Theatre)

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (By Respondent Lucille Marleau Cragin, d/b/a El Portal Theatre)

Respondent, Lucille Marleau Cragin, d/b/a El Portal Theatre, hereinafter called "Cragin", respectfully submits to the Court her Brief in Opposition to Petition for Writ of Certiorari, as follows:[1]

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[1]All defendants were represented in the lower courts by attorney Harry B. Swerdlow. By substitution of attorneys filed therein, defendant Cragin is now represented by Franklin N. Smith and John D. O'Brien, her Nevada Counsel in the District Court proceedings.

ISSUE

Whether both courts below correctly determined that the refusal of the defendant motion picture exhibitors to exhibit films on a first-run day and date basis[2] with plaintiff resulted from an agreement or conspiracy between said defendants to violate Section 1 of the Sherman Act (15 U.S.C. § 1).

STATEMENT OF THE CASE OMITTED

Pursuant to Supreme Court Rule 40 (3) defendant Cragin elects not to submit a statement of the case since all relevant facts are adequately set forth in the Opinion of the Circuit Judge (Appendix hereto). Petitioner's version of the testimony adduced in his behalf will be briefly commented upon in the ensuing Argument.

ARGUMENT

In essence, Syufy contends that the District and Circuit Judges failed to consider certain testimony, and that, under principles established by prior decisions, the issue of the defendants' conspiratorial conduct should have been submitted to the jury.

A. A portion of plaintiff's recitation of the facts is devoted to "split agreements" between various defendants. But it is to be noted that these were not challenged by Syufy in the Circuit Court (Appendix, page 9), and in any event, the existence of a split system of distributing

[2]A first-run day and date motion picture is one simultaneously exhibited for the first time in a certain locality by two theatres.

motion pictures to exhibitors, of itself, does not constitute evidence of a conspiracy to violate anti-trust laws. *Dahl, Inc.* v. *Roy Cooper Co.*, 448 F2d 17 (9th Cir. 1971); *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F2d 285 (3rd Cir. 1963), aff'd Curiam, 378 U.S. 123; *Brown* v. *Western Massachusetts Theatres, Inc.*, 288 F2d 302 (1st Cir. 1961).

The evidence does not reflect that any of the exhibitors were required to bid upon films, or that these split agreements were motivated by anything other than individual business practices, or that plaintiff was precluded from joining therein. In fact, Syufy did participate in one such agreement and voluntarily withdrew therefrom (Appendix, page 9).

B. From the hundreds of pages of transcribed testimony, plaintiff proffers only a few isolated statements which are alleged to raise factual issues for the jury, namely statements made by witnesses Lloyd Katz, general manager of Nevada Theatre Corporation (a defendant dismissed from the action prior to trial), Emmett Shane, an employee of defendant National General Theatres, Inc. and by Syufy himself.

Lloyd Katz is alleged to have testified to the fact that motion picture exhibitors offered exhibitors the choice of bidding films on either an exclusive or day and date basis (T. 266-271). Actually, Katz makes reference to a "class" of films which were "compatible to this type of distribution", whatever that may mean. Certainly it does not establish that such films were of the kind defendants were exhibiting, and the dates to which he refers are between 1966 and 1968, which might well have been prior to the applicable four year period commencing on November 24, 1967.

The testimony of witness Emmett Shane (T. 771-780), and statements attributed to Horst Schmidt (T. 955-958) and Lloyd Katz (T. 945-953), were offered as proof of the existence of an agreement or conspiracy not to bid pictures against Syufy. Aside from the fact that this "proof" generally consisted of vague references to an "understanding", "policy" or "arrangement" between some of the defendants, no evidence was introduced to establish that any agreement which might be inferred therefrom was entered into for the purpose or with the intent to injure plaintiff or his business in any manner. The testimony of Syufy himself was of no more significance in this respect than that of his witnesses, and it is to be noted that no mention was made of the distributors of these motion pictures, although they were the ones with absolute control over the films to be offered to the exhibitors, and what bids to be accepted therefor (Appendix, pages 12-13).

Such testimony might indicate a separate course of conduct pursued by the defendants, but the District Court and the Circuit Court of Appeals found that individual business reasons motivated the refusal of each defendant to bid day and date pictures against Syufy, or any drive-in theatre, since they would make more money by so doing; that this course of conduct was not aimed at Syufy, nor intended to injure him; and that, though parallel in the actions of each other, the decisions to bid in this manner were reached separately and independently and not by mutual agreement or pursuant to any conspiracy. The evidence fully supports these findings.

The rule, in such cases, is well stated in *Dahl, Inc.* v. *Roy Cooper Co.*, supra, 448 F2d 17, at page 19, as follows:

> "Thus, conspiracy is the gravamen of this complaint. Dahl need not show explicit contractual agreements in order to prove a conspiracy, but it must demonstrate more than that the alleged co-conspirators engaged in a course of conduct, even if conscious of each other's parallel behavior, in which they would have engaged regardless of the others' conduct."

It is clear from the evidence, and Syufy must concede that he could have adopted the defendants' practice of bidding upon a first-run exclusive basis, and that he was not precluded from so doing. He chose instead, for his own business reasons, to play day and date. By means of this present action, he seeks to compel the defendants to adopt his method of operation in the place of theirs. As stated in *Dahl, Inc.* v. *Roy Cooper Co.*, supra, 448 F2d at page 19, "we cannot escape the conclusion that Dahl [Syufy] really is complaining that it was not apportioned film by the distributors free from the necessity of competing for it."

C. As a final point, plaintiff contends that the opinion of the Court of Appeals in this case directly contravenes the decision of *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), in that, although the Circuit Court acknowledged evidence of defendants' parallel business conduct by admitting that "it is true that the film exhibitors all refused to bid for films on a day/date basis", it declined to submit the question of defendants' conspiracy to a jury. It is asserted that, under the *Theatre Enterprises* case, this evidence alone creates an issue of fact concerning the existence of a possible conspiracy.

This decision does not so hold. In fact, it is cited with approval in *Dahl, Inc.* v. *Roy Cooper Co.*, supra, 448 F2d 17, as authority for the principle quoted hereinabove to the effect that a parallel course of conduct by defendants, even if each is conscious of the other's like behavior, is not of itself a violation of the anti-trust laws. Lacking additional evidence of an agreement or conspiracy, there was no factual issue to submit to the jury.

CONCLUSION

For the reasons set forth above, respondent Cragin submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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Dated, Las Vegas, Nevada, October 13, 1978.

APPENDIX

UNITED STATES COURT OF APPEALS
Ninth Circuit

No. 76-2003

Syufy Enterprises, a Partnership, Successor in Interest to Original Plaintiffs, Las Vegas Drive-In Theatre, Inc., Smoke Ranch Drive-In Theatre, Inc., Las Vegas Theatre Corporation, and Confection Corporation of Las Vegas, Inc.,

Appellant,

vs.

National General Theatres, Inc., ABC Intermountain Theatre Co., Nevada Theatre Corporation, Southwest Amusement Corporation, Lucille Marleau Cragin, d/b/a El Portal Theatre, and Las Vegas Cinerama Theatre Co.,

Appellees.

[Filed Apr. 7, 1973]

Appeal From the United States District Court
District of Nevada

OPINION

Before: KILKENNY and GOODMAN, Circuit Judges, and MURRAY, District Judge.*

KILKENNY, Circuit Judge:

Appellant appeals from a directed verdict granted on its antitrust claim against appellees. The district court concluded that the evidence of violation of § 1 of the Sherman Act, 15 U.S.C. § 1, was insufficient. We affirm.

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*The Honorable William D. Murray, Senior United States District Judge for the District of Montana, sitting by designation.

FACTS

This action was filed in federal district court in 1971 alleging violations of §§ 1 and 2[1] of the Sherman Act. In essence, the complaint charged certain Las Vegas theatre owners of conspiring with non-named film distributors to confine the exhibition of first run films to appellees' theatres. In addition, appellees were charged with secretly agreeing to divide first run films among themselves to the exclusion of the appellant. Appellees answered and also counterclaimed alleging that the appellant had engaged in abuse of the litigation process. The trial before a jury commenced in 1975, and at the conclusion of the appellant's case the court granted appellees' motion for a directed verdict. Appellant filed a notice of appeal which was dismissed without prejudice in light of the pending counterclaim. The counterclaim went to trial in 1976, and appellant's motion for mistrial was granted. The counterclaim was then severed from the original complaint allowing for this appeal.

THE LAS VEGAS THEATRE MARKET

Appellant entered the theatre business in Las Vegas in 1966 when it opened the Las Vegas Drive In. Four of the named appellees were operating theatres at that time, the Nevada Theatre Corporation [NTC], National General Theatres [National General], Las Vegas Cinerama [Cinerama], and Cragin. (Hereinafter collectively referred to as exhibitors.) All of these appellees were operating conventional indoor theatres when the appellant opened its drive-in theatre. There were two other drive-ins in Las Vegas in 1966, one operated by National General and the other by a non-party. Another named appellee, ABC

[1]The § 2 claim was not pursued.

Intermountain Theatre Co. [ABC], opened its first Las Vegas theatre in 1970.[2] The record does show that during the 1966-1971 period there was at least one other theatre, The Bonanza, operating in the Las Vegas market.

During the five years preceding this action Las Vegas theatre owners drifted in and out of so called "split agreements." As defined by the district court a split is an arrangement among participating exhibitors in a market area entered into with the knowledge and consent of distributors. The participants therein agree that a member thereof shall have the first right to negotiate with a licensing distributor. A split can be by company or by picture. In a company split, the participating exhibitors agree that a member thereof shall have the right to negotiate for the pictures released by a given company prior to any other members doing so. In a picture split, the participants agree that a member thereof shall have the right to negotiate for a particular picture prior to the other members so doing. From 1951 to 1965 there were only two exhibitors in Las Vegas, and they were parties to a split agreement. During 1966 and 1967 there was no split agreement, and all theatre owners competed freely for films. In 1968 another split agreement was born among National General, Cragin, and NTC. The split dissolved, and for all of 1969 and 1970 the Las Vegas exhibitors again bid without restraint for their films. In 1971 all of the named appellees, as well as the appellant, formed yet another split agreement. Appellant withdrew later that year and filed this claim. At no time was the Bonanza Theatre a party to any split agreement. Appellant does not challenge nor would such a challenge be

[2]Appellant introduced no proof as to Southwest Amusement Corporation.

sustained to the various split agreements. *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 20 (CA9 1971).

In addition to the split agreements, the process of procuring a motion picture for showing in a particular theatre is complicated by the terms of the distributor's contract with the individual exhibitor. Generally, distributors ask for bids on all their films. They can seek bids on at least three sets of terms. First, the distributor can extend bid invitations to an exhibitor on an "exclusive" basis. As the district court found, a picture exhibited on an exclusive basis is shown at only one theatre in any one particular market area. Second, the distributor can offer to bid the film on a "day/date" basis. This would mean that the film would be shown at more than one theatre, either drive-in or conventional, in a given market area at any one time. Third, the distributor could offer the film to bidders under either plan and then decide which one to accept. This is commonly referred to as "either/or" bidding. The decision on how to offer films for bids and what bids to accept rests solely with the distributor.

The business reasons for the differing types of exhibition contracts are obvious. The day and date allows the theatre owner to submit lower bids for films since they will not have the exclusive showing rights. This is balanced by the fact that the theatres using day and date will be competing for the same customers. The exclusive showing rights afford just the opposite considerations. Exhibitors pay higher film rental rates, but are guaranteed exclusivity. In addition, the distributors will have a greater opportunity to profit from second showings in other theatres if the first run was on an exclusive basis.

The appellant contends that the named appellees agreed not to bid for films on a day/date basis. Consequently, appellant charges that it was forced to bid for all

films on an exclusive basis. Appellant claims that it was new to the Las Vegas theatre market, and consequently was unable to offer the sort of past attendance figures to allow it to bid successfully for most exclusive pictures. The district court found that there was no evidence to show that the appellees had conspired to refuse to bid day/date to the detriment of the appellant. We agree.

STANDARD OF REVIEW

Since this matter is before the court from the entry of a directed verdict, our standard of review is quite strict. Our recent opinion in *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (CA9 1976), *cert. denied* 429 U.S. 940, accurately describes our task:

> "Our inquiry, therefore, is not whether there is substantial evidence supporting a finding of independent business purpose, but whether no reasonable jury could have found that Distributor participated in a conspiracy to restrain trade. The burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact, and, in determining whether the burden has been met, we must draw all inferences of fact against the movant and in favor of the party opposing the motion." at 683.

Although this language speaks with respect to a motion for summary judgment, the *Calnetics* court properly expanded it to review of directed verdicts. *See also, Santa Clara Valley Distributing Co. v. Pabst Brewing Co.*, 556 F.2d 942, 944 (CA9 1977).

EXHIBITORS' INVOLVEMENT

Appellant offered two witnesses to prove there was an agreement among Las Vegas theatre owners not to bid

day/date for films to be shown in their market. The first witness was one Shane, former head booking agent at National General. His testimony is somewhat ambiguous, but a fair reading does not show the existence of any agreement among the appellees to refuse to bid day/date with appellant. The other witness offered to prove the conspiracy was the appellant himself. He suggested that several employees of the appellees had told him that they could not bid on a day/date basis for films because of an agreement between the various appellees. The distributors were not mentioned. Again the record is devoid of any substantial proof of an actionable conspiracy. Rather, the testimony of officials of the various exhibitors demonstrates that each theatre had a formal individual policy of bidding for films on an exclusive basis only.

While it is true that the film exhibitors all refused to bid for films on a day/date basis, this mere parallel conduct, in and of itself, does not equate with proof of a conspiracy. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Dahl, Inc. v. Roy Cooper Co., supra; C-O Two Fire Equipment Co. v. United States,* 197 F.2d 489 (CA9 1952), *cert. denied* 344 U.S. 892. The testimony indicated that there were various independent business reasons for choosing to bid for films on an exclusive only basis. Proof of mere parallel action on this record is insufficient. Furthermore, the testimony shows that the Bonanza theatre, not charged to have been a member of the alleged illegal conspiracy, at all relevant times chose not to bid for films on a day/date basis despite appellant's requests that it do so. We can only assume that the independent business motivation for offering films on an exclusive basis was behind Bonanza's decision.

DISTRIBUTORS' INVOLVEMENT

It is the distributors' absolute control over film exhibition that fully exposes the fatal flaw in appellant's arguments. As we have noted, the motion picture distributors decide how to offer films to the exhibitors and just what bids to accept, yet they are not defendants nor charged with the conspiracy. Since the exhibitor can only bid for films consistent with the distributors' bid invitation, the appellant must show that films were offered for bids on a day/date basis in the Las Vegas area before it could prove that the appellees had conspired not to bid for the films on a day/date basis. Here appellant offered no evidence that films were available on a day/date basis. In fact, on cross-examination appellant admitted that the large majority of films offered for bids during the 1967-1971 period where available on an exclusive basis only. Manifestly, the appellees could not conspire to refuse to bid on something that was not available to them. *A.L.B. Theatre Corp. v. Loew's Inc.*, 355 F.2d 495 (CA 7 1966).

Moreover, appellant has failed to show that there was anything but an individual decision on the part of each distributor to offer films on an exclusive basis only. While the record does indicate that a distributor's decision on the method of offering its films to exhibitors may be influenced by the exhibitors themselves, there is no evidence to suggest that the appellees in any way dictated distributor policy. A mere refusal by an individual distributor to offer films on a day/date basis without an agreement does not violate the antitrust laws. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1220 (CA9 1977), and *Dahl, Inc. v. Roy Cooper Co., supra.*

DAMAGES

In the light of the above conclusions, we do not reach the issue of damages.

CONCLUSION

The judgment of the district court must be affirmed.

IT IS SO ORDERED.